(3)

No. 90-1232

FILED
APR 12 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

SMS DATA PRODUCTS GROUP, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ANTHONY J. STEINMEYER
FRANK A. ROSENFELD
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that the General Services Administration Board of Contract Appeals had misinterpreted the terms of a Department of the Interior solicitation for bids on a data processing contract.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	7

TABLE OF AUTHORITIES

Statutes:

40 U.S.C. 759(e)	5, 6
40 U.S.C. 759(f)	3
40 U.S.C. 759(f)(5)(B)	6
41 U.S.C. 253a	7
41 U.S.C. 253a(a)(1)(A)	7
41 U.S.C. 253a(a)(2)(B)	7

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1232

SMS DATA PRODUCTS GROUP, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 915 F.2d 1544. The opinion of the General Services Administration Board of Contract Appeals (Pet. App. 40a-105a) is reported at 90-2 B.C.A. (CCH) ¶ 22,799.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1990. A petition for rehearing was denied on November 6, 1990. Pet. App. 106a-107a.

The petition for a writ of certiorari was filed on February 4, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In February 1989, the United States Geological Survey, Department of the Interior (USGS), issued Solicitation No. 7510 for acquisition of computer systems intended for use in over 200 field offices. Pet. App. 2a-3a. Mandatory specifications included "an unlimited license for software use," whereby "all users of the system are allowed to execute the software simultaneously and the software may be executed on all processors that are part of the system." *Id.* at 19a-20a. Petitioner SMS Data Products, Inc., respondent Data General Corporation, and Lockheed Missiles and Space Co., Inc., each submitted proposals that passed the required benchmark demonstration. As a result, the USGS informed the firms that "price would control [the] award." *Id.* at 10a.

Petitioner then submitted a Best and Final Offer (BAFO) that was the "lowest-priced offer." Pet. App. 10a. The USGS realized, however, that petitioner's proposal—as clarified by a letter postdating its BAFO—was the lowest because the proposal offered only limited software licenses. The USGS determined that petitioner's proposal did not offer licenses permitting all users to use software simultaneously (as required by the bid solicitation), but rather offered licenses provided on a "per user" basis sufficient to cover only one user at each workstation. Moreover, the USGS found that petitioner's proposal did not license software to all processors (as required by the bid solicitation). Instead, the proposal "split" the licensing of its data base program into front-

end and back-end packages, with the latter licensed for only a small percentage of the total number of processors in the evaluated system. See *id.* at 10a-12a.

In light of petitioner's failure to satisfy the solicitation's licensing requirements, the USGS in December 1989 "disqualified [petitioner] from the competition and awarded the contract to Data General, which had submitted the next-lowest priced responsive offer." Pet. App. 13a. Petitioner and Lockheed then filed separate protests to the General Services Administration Board of Contract Appeals (Board). See 40 U.S.C. 759(f).*

2. In March 1990, the Board granted petitioner's protest, holding that the USGS, "if it intends to procure [the solicitation's] requirements, must amend the solicitation to reflect its true software licensing requirements and conduct further discussions with the offerors, and make award on the basis of revised BAFOs." Pet. App. 41a-42a.

The Board first concluded that petitioner could reasonably have read the solicitation to allow licensing limited to only one user at each workstation. Pet. App. 90a-92a. The Board also interpreted the solicitation to permit petitioner to propose software licenses authorizing use of back-end software on some —but not all—processors. *Id.* at 95a. The Board thus concluded that the USGS should not have disqualified petitioner for failing to submit a proposal meeting the solicitation's specifications.

The Board also directed the USGS to revise its solicitation and then seek new BAFOs if it insisted on the requirements that petitioner failed to meet,

---

* The Board denied Lockheed's separate protest, Pet. App. 105a, and Lockheed sought no further review of that ruling.

namely, unlimited users and front-end and back-end software on all processors. Pet. App. 104a-105a. The Board recommended, however, that the USGS abandon these requirements since they were not necessary:

> We believe that [the USGS] should reconsider whether it really wants to be charged the inevitable higher prices for something—unlimited simultaneous use of software packages—which, in effect, it admits in its solicitation it will rarely if ever need. * * *
>
> [Petitioner] has made a convincing case for questioning whether as a practical matter it makes sense to have or pay for a complete database package resident on the 5,148 work stations. Wouldn't it truly be "incredibly stupid" to run * * * back-ends on diskless work stations, as testified by Data General's own expert?

Id. at 94a-95a.

3. On an appeal filed by Data General, the Federal Circuit reversed, concluding that "[t]he board's decision rests on a misinterpretation of the * * * solicitation and a misunderstanding of its own limited procurement role." Pet. App. 17a. First, the court of appeals held that the Board "disregarded the plain meaning of the licensing provision," which "unequivocally requires bidders to provide software licenses not limited to any specific number of users or particular processing configuration." *Id.* at 17a-18a. Petitioner's proposed split of front-end and back-end licenses and its pricing of software licenses on a per user basis, the court determined, violated the plain terms of the solicitation. *Id.* at 19a-25a.

Second, the court of appeals concluded that the Board "erroneously equated the terms 'user' and 'workstation,' leading it to misinterpret [petitioner's] proposal as technically compliant." Pet. App. 18a. Petitioner could not assume one user per workstation, the court explained, given the large number of users with access to the systems, both because there will be multiple users at each workstation and because of extensive remote access to the systems by outside parties through the users' own equipment. *Id.* at 25a-26a; see also *id.* at 26a-31a.

Third, the court determined that the Board erroneously relied on the "simplified" parameters of the benchmark demonstration test, which artificially assumed one user per workstation. In the court's view, the Board thus disregarded the flexibility in configurations that the solicitation specifically required for the actual systems when installed. Pet. App. 18a, 32a-36a.

Finally, the court observed that "[t]he board's independent assessment of whether the agency would or should" impose its front-end/back-end and unlimited user requirements "is also illegal, at least to the extent it infected the board's analysis of both the solicitation and the technical compliance of [petitioner's] offer." Pet. App. 37a. Under 40 U.S.C. 759(e), the court pointed out, the Board may not "interfere with the determination by agencies of their individual data processing equipment requirements." Consequently, the Board "has no warrant to question the agency's judgment or to revise its delegation of procurement authority to ensure that the agency's assessment of its 'true' needs is in harmony with the board's." Pet. App. 39a.

ARGUMENT

1. Petitioner broadly contends that the Federal Circuit "has improperly narrowed the scope of the Board's bid protest jurisdiction." Pet. 15. In particular, petitioner argues (Pet. 25-28, 26-32) that the court of appeals erred in applying the proscription of 40 U.S.C. 759(e), which prohibits the General Services Administration from acting "to impair or interfere with the determination by agencies of their individual data processing requirements," to circumscribe the Board's review of bid protests.

That issue is not presented here. In its review of petitioner's protest, the Board did not directly assert any such authority "to impair or interfere with the [USGS's] determination * * * of [its] data processing requirements." 40 U.S.C. 759(e). To the contrary, the Board expressly allowed the USGS to impose its chosen requirements—albeit with the pointed suggestion that the agency reconsider those aspects of the solicitation. See Pet. App. 94a ("We believe that [the USGS] should reconsider whether it really wants to be charged the inevitable higher prices for something—unlimited simultaneous use of software packages—which, in effect, it admits in its solicitation it will rarely if ever need."). Accordingly, until the Board renders a decision asserting authority, despite Section 759(e), to redefine a contracting agency's data processing needs—and the Federal Circuit has an occasion squarely to address that issue—further review of petitioner's claim on the record presented here would be premature.

2. Petitioner also contends (Pet. 18-26) that the court of appeals exceeded its authority because the Board's decision fell within its jurisdiction under 40 U.S.C. 759(f)(5)(B), which authorizes the Board to require agency compliance with applicable "stat-

ute[s] or regulation[s]." In particular, petitioner points to 41 U.S.C. 253a(a)(1)(A), requiring an agency to draw up specifications for data processing solicitations "in a manner designed to achieve full and open competition," and to 41 U.S.C. 253a(a)(2)(B), authorizing an agency to impose "restrictive provisions or conditions only to the extent necessary to satisfy [its] needs * * *." Again, petitioner is attacking a straw man. In its decision overturning the USGS's contract award, the Board nowhere purports to resolve the case on the grounds that the agency violated the directives set forth in Section 253a. That is readily understandable in light of petitioner's failure before the Board to challenge the USGS's decision on that score. See also Data General Br. in Opp. 5-6.

At bottom and despite petitioner's characterizations, this case involves a straightforward fact-specific issue, namely, whether the Board misinterpreted the terms of the USGS's solicitation for bids on a particular data processing contract. The court of appeals' resolution of that question is unexceptionable. Further review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ANTHONY J. STEINMEYER
FRANK A. ROSENFELD
Attorneys

APRIL 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20489